

Present: Mr. Justice Middleton and Mr. Justice Grenier.

1907.
June 26.

SAPARAMADU v. SAPARAMADU *et al.*

D. C. Negombo, 5,709.

Partition suit—Fiscal's sale pending partition suit—Validity—Sale by purchaser—Invalidity—Alienation by owner not party to the suit—Substitution—Ordinance No. 10 of 1863, s. 17.

Where pending a partition suit the plaintiff's share was sold by the Fiscal, and the purchaser at such sale, who was not made a party to the suit, sold it to a third party—

Held, that the sale by the purchaser to such third party was void under section 17 of Ordinance No. 10 of 1863, notwithstanding that such purchaser was not a party to the suit, and that he was not entitled to maintain the action as substituted plaintiff.

Held, also, that the Fiscal's purchaser may be substituted as plaintiff and the action proceeded with.

SUIT for partition. The plaintiff alleged that Harmanis Sapparamadu and his wife were the original owners of the land sought to be partitioned, and that they died about twenty-five years ago, leaving as their heirs five children, and also leaving an estate under Rs. 1,000 in value. The children were (1) Louis, (2) Pelis, (3) Joranis, (4) Jusiappu, and (5) Marihamy, each of whom became entitled to an undivided one-fifth share. Jusiappu died unmarried and without issue, and each of the other children inherited an undivided one-twentieth share from him. The husband of Marihamy (Paaris), after her death and the death of their child, sold one-fifth share to Pelis, reserving to himself one-twentieth. Pelis died leaving him surviving his widow, the original plaintiff, and an only child, Sutogis. The plaintiff claimed a partition of the land in the following shares:—

Plaintiff	...	...	9/20
First defendant (Louis)	...	...	5/20
Second defendant (Joranis)	...	...	5/20
Third defendant (Paaris)	...	...	1/20

After inquiry an interlocutory decree was entered and a commission was issued on 24th February, 1905, to partition the land in the above proportion. Before the scheme of partition was confirmed and final decree entered, to wit, on 21st September, 1906, one Don Charles Saparamadu Appuhamy made an application to be added as a party to the suit, alleging that under writ of execution issued in case No. 5,644 of the District Court of Negombo against the estate of the late Pelis and against the first defendant their interests were sold by the Fiscal and purchased by one J. H. W.

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Karunaratne on the 27th July, 1905 (Fiscal's transfer dated 28th May, 1906), who sold it to the said Charles Saparamadu Appuhamy by deed No. 4,262 dated 9th July, 1906. Charles Saparamadu Appuhamy was added as a party on 8th October, 1906, after notice to the parties, and was substituted as plaintiff on 14th November, 1906. On 15th November, 1906, the District Judge (A. de A. Seneviratne, Esq.) dismissed the action, holding that the deed in favour of Charles Saparamadu Appuhamy, the substituted plaintiff, was void under section 17 of Ordinance No. 10 of 1863.

The substituted plaintiff appealed.

H. J. C. Pereira, for appellant.

Sampayo, K.C., for respondent.

Cur. adv. vult.

26th June, 1907. GRENIER A.J.—

This is a partition action. The plaintiff alleged that Harmanis Saparamadu and his wife were the original owners of the land sought to be partitioned, and that they died about twenty-five years ago, leaving five children and an estate under the value of Rs. 1,000. The children were (1) Louis, (2) Pelis, (3) Joranis, (4) Jusiappu, (5) Marihamy, who each became entitled to one-fifth share. Jusiappu died unmarried and issueless, and his share devolved on the survivors, each getting an additional one-twentieth. The husband of Marihamy, on her death and the death of their child, sold one-fifth to Paaris, reserving to himself the one-twentieth which came to him through Jusiappu. Pelis died leaving him surviving his widow, the plaintiff, and an only child, Sutogis. The plaintiff being the administratrix of the estate of Paaris, the plaintiff claimed to be entitled to nine-twentieths, allotting to first defendant Louis five-twentieths, to second defendant Joranis five-twentieths, and third defendant Paaris one-twentieth.

The first defendant alone filed a statement of claim, and he prayed for a declaration of title to a four-fifteenth share of the land and house standing on it, and for compensation in respect of a plantation that he had made of 90 coconut trees, valuing the improvements at Rs. 150. The case appears to have been heard *ex parte*, and after the examination of the plaintiff, the District Judge entered an interlocutory decree for partition, allotting the shares as follows: Plaintiff, nine-twentieths; Louis, five-twentieths; Joranis, five-twentieths; third defendant, one-twentieth; and a commission was issued to Mr. Tissera to partition the land accordingly. This was on the 24th February, 1905. Before the partition was confirmed by the Court and final decree entered, the reason for the delay not being quite clear, one Don Charles Saparamadu Appuhamy, who was subsequently substituted as plaintiff, came into

the case, alleging that on a writ of execution against the original plaintiff as administratrix of the estate of Paaris and the first defendant personally their eleven-fifteenth shares were sold and purchased by one Karunaratne, who had sold the same to him. The Court, by its order dated the 14th November, 1906, substituted Don Charles Saparamadu Appuhamy as plaintiff in the room of the original plaintiff, who admitted that her interests had passed to him. On the same day the order of substitution was made there was a discussion in the Court below in regard to the right of Don Charles Saparamadu Appuhamy to be substituted plaintiff, as the conveyance to him by Karunaratne was one made during the pendency of the partition proceedings. The District Judge decided that the sale by Karunaratne was void. On a true construction of section 17 of the Partition Ordinance, No. 10 of 1863, the District Judge was right in so deciding. This Court has held that a forced alienation, such as takes place when the Fiscal sells by virtue of a writ in his hand, is not obnoxious to the provisions contained in section 17. The sale is good and passes title, and the purchaser is at liberty to take the place of the execution-debtor in the partition case. See *Perera v. Perera*.¹

This Court has also held—see *Annamalay Pillai v. Perera*²—that a sale in the circumstances in which the substituted plaintiff purchased is absolutely void, and not voidable only, that is to say that the purchaser from a person who has bought at a Fiscal's sale any interest in the land which is the subject of partition derives no title whatever by his purchase. All the previous decisions were reviewed in the case of *Annamalay Pillai v. Perera*,² and, in my opinion, the construction placed by Moncreiff and Middleton JJ. on section 17, in view of the language employed in it, was eminently correct. In *Dewar Umma v. Ismail Marikar*³ Wood Renton J. has construed section 17 in the same way in which it was construed in *Annamalay v. Perera*² by a majority of the Court. The limitation placed by Clarence and Dias JJ. on the words "any owner" in section 17 is not justified, because it will result in introducing into the enactment certain words of qualification repugnant to the plain intention of the Legislature, which was to expedite and make easy the settlement of land disputes by means of partition actions. I would, therefore, hold that the sale to substituted plaintiff by Karunaratne, although Karunaratne was no party to the action, was absolutely void, because it was a sale by the owner of certain shares pending partition proceedings.

The District Judge was, however, wrong in dismissing the action. The appellant's conveyance having been held to be void, it was open to the District Judge, considering that this was a partition action, to strike his name out, and order that Karunaratne be made

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¹ (1906) 9 N. L. R. 217.

² (1902) 6 N. L. R. 108; ³ *Browne* 200.

³ (1906) 3 *Balasingham* 99.

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a party in the place of the original plaintiff, re-apportioning the shares by allotting to Karunaratne the eleven-fifteenths he had purchased which belonged to the original plaintiff and first defendant, and then entering a fresh interlocutory decree on that footing.

Although the original plaintiff has admitted that her interests have passed to Karunaratne, the District Judge will hold an inquiry into his title as derived both from her and the first defendant as a precautionary measure. The decree appealed from dismissing the action will therefore be set aside, and the case sent back for the purposes I have already indicated. There will be no costs of this appeal.

MIDDLETON J.—

I agree in the order proposed by my brother Grenier.

In *Baban v. Amerasinghe*¹ Phear C.J. laid it down that an alienation pending partition proceedings must be treated as void as against those proceedings, but good *aliunde*.

In *De Silva v. Carlina*² Clarence and Dias JJ. limited the prohibition in section 17 of the Partition Ordinance to owners who were parties to the proceedings, and followed the ruling in *Baban v. Amerasinghe*¹ and *Gunawardene v. De Livera*.³

In *Wijeyewardena v. Seetalahamy*⁴ Lawrie J. and Browne J. followed the ruling in *De Silva v. Carlina*,² when Lawrie J. expressed his disapproval of it.

In *Annamalay Pillai v. Perera*⁵ my brother Moncreiff and myself held as members of the Full Court—my brother Wendt dissenting—that a sale of property the subject of a partition action pending the partition proceedings was absolutely void under section 17 of the Partition Ordinance.

In *Perera v. Perera*⁶ the Full Court, including my brothers Wendt and Wood Renton and myself, held that a sale by the Fiscal of property the subject of a partition action was not within the terms of section 17.

The decisions of these Full Courts are unquestionably binding on us, and I therefore agree that the sale by Karunaratne to the substituted plaintiff must be held to be void, and the decision of the District Judge affirmed on that point.

Appeal dismissed.

¹ (1878) 1 S. C. C. 24.

² (1891) 9 S. C. C. 141.

³ (1881) 4 S. C. C. 52.

⁴ (1900) 5 N. L. R. 190.

⁵ (1902) 6 N. L. R. 108.

⁶ (1906) 9 N. L. R. 217.